

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MICHAEL O.,

Claimant,

and

SAN GABRIEL/POMONA
REGIONAL CENTER,

Service Agency.

OAH Case No. L 2006090855

DECISION

This matter was heard by Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Pomona, California, on March 7, 2007.

Daniela Martinez, Fair Hearing Program Manager, San Gabriel/Pomona Regional Center (Regional Center or Service Agency), represented Service Agency.

Nancy A. Torres, Attorney at Law, represented Claimant.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

ISSUE

Is Claimant eligible for Service Agency services by reason of a developmental disability within the meaning of the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act)?

FINDINGS OF FACT

1. Claimant was born on May 13, 1988, and was 18 years of age at the time of the hearing. He resides with his mother and his brother.

2. The earliest assessment of Claimant's cognitive ability submitted into evidence occurred in November 9, 2000. It was conducted by I.S. Harang (Harang), a resource specialist with the Los Angeles Unified School District (LAUSD). Claimant started attending Stevenson Middle School in September 2000, as a sixth grader. Teachers reported that Claimant was absent about a third of the time, that he did not participate in class, that he spoke at inappropriate times during class, that he had difficulty following directions, that he was distractible, and that he was often alone. Harang administered the Woodcock Johnson Tests of Achievement and obtained grade-equivalent or higher scores in a majority of the areas: 5.8 in letter word identification, 6.2 in passage comprehension, 8.2 in written samples, and 5.4 in applied problems. Harang did not address the aberrant nature of the 16.9 score in word attack. Claimant attained below-grade scores in reading vocabulary (2.7), dictation (3.9), and calculation (4.3). Harang reviewed Claimant's strengths and weaknesses as revealed by the testing, noting that Claimant's strengths were in reading and word attack; he was able to blend multisyllabic words with long/short vowels, silent consonants and three letter blends. Harang relied on reported processing deficits in auditory and visual channels identified by the school psychologist in concluding that Claimant would benefit from the resource specialist services in language arts and mathematics.¹

3. A meeting was held on January 1, 2001, to evaluate Claimant's eligibility and needs for special education. He was attending El Sereno Middle School at the time. The LAUSD team reviewed Harang's data and recommendation. The team concluded that Claimant was performing at grade level in reading and written language, but that he needed special services in mathematics. The team found Claimant eligible for special education services under the category of "specific learning disability," designating the areas of suspected disability as "auditory and visual processing." The team approved the services of the resource specialist for one period each day and recommended counseling due to Claimant's extreme social anxiety, low self-esteem, and poor social skills.

¹ School records were received at the hearing containing year-end progress comments by teachers prior to this evaluation. These records were not relied upon by any evaluators, but were apparently reviewed by Service Agency personnel involved in the eligibility determination. In pertinent part, the notes state: "Progress has been affected by frequent absences. Well behaved. Quiet. Needs lots of encouragement." (Kindergarten); "Quiet, easily distracted, slow. Needs praise and encouragement." (First Grade); "Soft spoken. Is capable of reading and writing well, but needs constant encouragement." (Second Grade); "Michael is very quiet and respectful. He reads well but does not comprehend at grade level. Difficulty with science and soc. studies. Much difficulty with math concepts. Often needs to be directed to activity or task. Poor listening skills and ability to follow directions. Referred to Guidance Committee 3/98." (Third Grade); "Base[d] on March-June 1999 observation by [replacement] teacher[,] marginal academic progress with potential because of good behavior but distracted attitude." (Fourth Grade); "Michael has made fair progress this year. His reading is approximately one grade level below standard. He has much difficulty with math concepts and needs constant encouragement to even try. He is quiet and easily distracted." (Fifth Grade).

4. In April 2001, Claimant's mother sought services at Eastern Los Angeles Regional Center (ELARC). On May 11, 2001, clinical psychologist Roberto De Candia, Ph.D. (De Candia), performed a psychological evaluation for ELARC. Dr. De Candia interviewed Claimant's mother, observed and interviewed Claimant, and administered the Wide Range Achievement Test, Revision 3 (WRAT-3), the Vineland Adaptive Behavior Scales (Vineland), and the Wechsler Intelligence Scale for Children-Third Edition (WISC-3).

Claimant attained WISC-3 scores within the mild range of mental retardation: verbal intelligence quotient (IQ) of 59; performance IQ of 60; and full scale IQ of 56. Minimal scatter was noted in the verbal subtest scores and even less in the performance subtest scores. However, Dr. De Candia concluded that these scores were not reflective of Claimant's actual ability. He reviewed the records set forth in factual finding numbers 2 and 3 and concluded: "The school notes that he has average IQ, and that he only functions below grade level in the area of math." The school's conclusions were consistent with results of the WRAT-3 he administered (sixth grade level in reading and in spelling and third grade level in arithmetic).

Results in the Vineland were consistent with mild mental retardation. Standard scores in communication (48), daily living skills (35), and socialization (46) were below Claimant's 13 years of age at age-equivalent 6.8, 5.9, and 3.9, respectively. Dr. De Candia, however, also discounted these results, stating: "Results of the Vineland suggest a Mild to Moderate deficit in adaptive skills. Yet, again it is my impression that this is an indication of behavior, rather than ability. He can do many tasks, but either does not do them, or does not do them without prompting and reminders. Mother indicates that he does not bathe well. At present, Michael does not have a best friend, and according to the mother he does not have any friends at school."

Dr. De Candia made the following comments regarding affect and behavior: "Although there is no psychiatric history it is my impression that emotional/psychiatric issues need to be evaluated further. The results of the present testing are very inconsistent with the history provided. It is highly unlikely that Michael would have such average academic scores if his overall intelligence fell within the mild range of mental retardation. His mood and affect are also too somber and restricted. He denies suicidal plans, but stated he wished he were dead. Mother notes that he 'talks off the wall.' So he may be experiencing confusion and the presence of sensory distortions have not been ruled out. He is irritable at home and fights with his brother, and the school has also noted emotional lability. His self esteem is also aggravated by severe acne, which his mother indicated he is self conscious about. Given the history that he has had a tumor removed from his neck at age one, perhaps a neurological evaluation is indicated to rule out any physical causes of his behavior. The family and the school notes that he becomes lost going from one class to another, and gets lost going home."

Dr. De Candia made no diagnosis under Axis II of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, but made the following Axis I diagnoses: "296.23 Major Depression, Single Episode, Severe (Provisional). 315.1 Mathematics Disorder."

5. On June 14, 2001, ELARC concluded that Claimant was not eligible for services, primarily by reason of Dr. De Candia's report.

6. At age 13, Claimant was hospitalized for 10 months at the Metropolitan State Hospital for auditory hallucinations and for using drugs.

7. On May 1, 2003, Claimant was evaluated at the Los Angeles County University of Southern California Medical Center by James Hanken, M.A. (Hanken), a Psychology Clerk intern working under the supervision of Louise Macbeth, Ph.D. Hanken noted that Claimant had been referred for cognitive assessment for mental health placement. Hanken reported that Claimant's diagnosis was schizoaffective disorder, depressed type, and that he was taking resperidone 1 milligram (mg), a generic of Risperdal, a psychotropic drug.

Hanken started to administer the WISC-3, but terminated the administration because Claimant gave up completing items that required more effort or consideration. Hanken also reported that Claimant made minimal eye contact, had flat affect, and displayed psychomotor retardation, poverty of speech, and slowed response to questions.

Hanken was able to administer the Test of Nonverbal Intelligence, Third Edition (TONI-3). This test requires selection of geometric shapes from a set of potential answers to complete a pattern. Claimant scored 83, an IQ number in the low average range, or the thirteenth percentile. However, Haig J. Kojian, Ph.D. (Kojian), an expert presented by Claimant at the hearing, testified that the test's usefulness is limited, as it only measures a small slice of cognitive functioning; in his experience, psychologists use the test as a screening device to determine if other cognitive measurements are indicated.

8. Claimant was next evaluated on June 13, 2005, by Armando de Armas, Ph.D. (de Armas), pursuant to court order to ascertain Claimant's competency to stand trial. Claimant had stopped taking Risperdal approximately one year before and had not experienced any auditory hallucinations since.

Dr. de Armas did not derive a specific diagnosis, but concluded that Claimant suffered from "genuine and serious psychological conditions that impact his daily functioning." He concluded that "because of developmental disability Michael is unable to assist counsel in conducting the defense in a rational manner."

Claimant's general cognitive ability, as estimated by the Woodcock Johnson Test of Cognitive Ability, was described in the intellectually deficient range, with overall intelligence assessed at 49 and verbal ability at 62, both of which were consistent with a seven-year-old's cognitive ability. Dr. de Armas administered the TONI-3 and obtained results equivalent to what would be expected of a nine-year, three-month child. In Dr. de Armas' opinion, Claimant's clinical presentation was consistent with the IQ test results.

Dr. de Armas used an assessment tool specifically tailored to competency determinations. Based on a criminal case vignette, Claimant was asked a series of questions to assess his understanding of the process. In Dr. de Armas' opinion, Claimant's developmental disability interfered with his competence to stand trial in a number of ways. Claimant could not distinguish between the roles of the major participants within the juvenile court system. His language comprehension was too undeveloped to keep up with court testimony. His reasoning ability was too low to discuss his case with defense counsel in a rational manner. His reasoning ability was too low to discuss possible plea alternatives with defense counsel.

9. Claimant is followed by the Department of Mental Health. He is presently taking psychotropic drugs Prozac 40 mg and Haldol (one injection each month), and Zyprexa as needed for sleeping. He attends a special day program two days each week.

10. Claimant no longer attends school. His last placement was at Cortez School, a special education school for children with emotional disturbance. Although eligible to attend until age 22, Claimant chose to stop attending, as set forth in the exit IEP at the school, completed July 5, 2006. The document notes that Claimant is receiving mental health services. His attendance was described as "minimal," although he was also described as a "good student, willing to work, and is compliant." It is stated that Claimant reads at third grade level "but does not comprehend anything he reads." His math skills were at second grade level. He had completed 10 high school credits of the 220 needed to take the high school exit examination.

11. Claimant sought services from Regional Center on June 26, 2006. An intake social assessment was completed on July 14, 2006. His mother reported on current functioning. Claimant walks with a normal gait and has full control of his extremities. He is able to perform many simple daily living activities, such as taking a shower, brushing his teeth, using the toilet, dressing himself, although he often requires reminders. He tends to wander off and get lost on his way to the bus stop; as a result he requires supervision to use public transportation. He can use money to purchase items and is able to make change to a dollar; however, he does not use his money wisely, spending it quickly, usually to purchase CDs. Claimant does not typically initiate interactions with peers or adults, but will respond to social approaches.

12. Claimant was referred to Sherri Johnson, Psy.D. (Johnson) for psychological evaluation. Dr. Johnson interviewed Claimant and his mother, administered the Wechsler Adult Intelligence Scale, Third Edition (WAIS-3), the Vineland, and the Peabody Picture Vocabulary III tests, and completed a report dated August 2, 2006. She reviewed the prior evaluations by Drs. De Candia and de Armas. Although Dr. Johnson did not formally evaluate academic functioning, school records reviewed indicated second grade reading comprehension and math skills.

Claimant obtained a full scale IQ of 62, with the subcomponent results in verbal IQ and Performance IQ measured at 66 and 62, respectively, all of which are in the mild range of mental retardation. Adaptive skills scores obtained through the Vineland were consistent with measured cognitive ability: standard scores in the mild mental retardation range in communication (66) and daily living skills (61) and in the borderline range in socialization (71). No clinically significant subtest scatter was measured. Language skills were significantly below age-expected skills in receptive and expressive vocabulary.

Dr. Johnson did not arrive at a formal diagnosis. She concluded: "The purpose of the present assessment is to determine eligibility for Regional Center services. Michael does not appear [to] meet the regional center criteria for Mental Retardation in that Michael's deficient cognitive abilities appear to be impacted by his psychiatric diagnosis. While mental retardation and a psychiatric diagnosis may be comorbid, the question of Michael's cognitive abilities prior to the onset of mental illness needs to be fully determined. The eligibility team is asked to review records and make a determination as to Michael's eligibility for Regional Center Services."

13. Regional Center staff psychologist Deborah Langenbacher, Ph.D. (Langenbacher), examined the records set forth in factual finding numbers 2 and 3, which were apparently not available to Dr. Johnson, in order to answer the question of cognitive ability prior to the onset of mental illness. Dr. Langenbacher concluded that Claimant was functioning at grade level before the onset of mental illness, and therefore opined that his existing cognitive and adaptive deficits are the result of mental illness, not developmental disability.

14. Service Agency concluded Claimant did not have an eligible developmental disability and denied eligibility for services, notifying him of the decision by letter dated August 16, 2006. Claimant thereafter filed a timely request for fair hearing. His representative subsequently requested a continuance of the scheduled hearing, and executed a Waiver of Time Set by Law for Lanterman Act Fair Hearing and Decision.

15. Dr. Kojian evaluated Claimant on December 27, 2006. He interviewed Claimant and his mother and administered the WAIS-3. The WAIS-3 yielded a full scale IQ result of 67, which Dr. Kojian characterized as "extremely low." The verbal performance IQ, described as "borderline" was measured at 71 and the performance IQ, described as "extremely low," was at 68. The subtest results were all scored as 4, 5, or 6, representing no scatter and confirming the overall conclusion of mental retardation. If anything, Dr. Kojian opined, the scores he obtained were higher than Claimant's true cognitive ability due the "practice effect" of repeated testing. Dr. Kojian did not administer the Vineland because the instrument had been previously used with consistent results. He diagnosed Claimant as suffering from mild mental retardation.

Dr. Kojian testified that some mentally retarded children achieve academic progress at the fifth or sixth grade level, an opinion with which Dr. Langenbacher partially agreed—in her view, this happens only “occasionally.” He also testified that some children may appear to read at or near grade level but lack the required comprehension, which may have been the case with Claimant; this opinion is corroborated by the observations of his third grade teacher. In Dr. Kojian’s opinion, Claimant “peaked” at the sixth grade level.

As Dr. Johnson also recognized, Dr. Kojian stated that mental illness and developmental disability can coexist. In Dr. Kojian’s opinion, Claimant presents with both conditions, as his mental retardation exists apart from his mental illness. In fact, Dr. Kojian took issue with Dr. Langenbacher’s opinion that schizoaffective disorders can significantly impact cognitive ability. In his opinion, there is little support in the literature for such connection. Dr. Kojian further opined that if Claimant’s mental illness appeared to impact the testing or evaluation process, then the evaluator had a duty to note the symptoms and to evaluate the validity of the results. Neither Drs. De Candia, de Armas, nor Johnson reported any problem with the validity of the tests administered.

LEGAL CONCLUSIONS

1. In order to be eligible to receive services from a regional center, a claimant must have a developmental disability, which is specifically defined as “a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.” (Welf. & Inst. Code, § 4512, subd. (a).)

2. Dr. Kojian diagnosed Claimant with mental retardation. His testing of Claimant’s cognitive ability was consistent with that of prior evaluators, namely Drs. De Candia, de Armas, and Johnson. They all agree that Claimant’s IQ falls in the mental retardation range. The one result that points to a higher, or borderline range, score, obtained by Hanken in the TONI-3, is not the correct or true measure of Claimant’s IQ. Not only is it in disagreement with measurements obtained by all others, but it was the result of a more limited assessment tool. Claimant’s adaptive skills are consistent with his measured cognitive ability. Vineland test results obtained by Drs. De Candia and Johnson show deficits in communication, daily living skills, and socialization. The Vineland scores, although slightly higher in the more recent testing, are also consistent over time. Intelligence and adaptive testing results have been consistent, both before and after Claimant’s psychiatric hospitalization.

Dr. Kojian's opinion is more persuasive than the contrary opinions of Drs. De Candia's, Johnson's, and Langenbacher's. On the one hand, Dr. Kojian's opinion is consistent with repeated objective measurements and Claimant's functioning over time. Except for Hanken's failed attempt to administer the WISC-3, no clinician stated that Claimant failed to complete a test due to lack of cooperation, mental impairment, or other inability to complete the test. On the other hand, neither Dr. De Candia nor Dr. Johnson adequately explained the reason(s) to disregard the results of their own testing. In conclusory language, Dr. De Candia attributed the mental retardation scores to "behavior" and to undiagnosed "emotional/psychiatric issues." Despite acknowledging that cognitive abilities before the onset of mental illness had to be evaluated, Dr. Johnson nevertheless concluded that Claimant did not "appear" to have mental retardation. Dr. Langenbacher did evaluate the earlier school records, but her testimony is not as persuasive in light of the facts that Claimant achieved his maximum level of academic achievement in the sixth grade and that even this achievement may have been overestimated by his ability to read without necessarily understanding. Accordingly, Claimant's mental retardation cannot be discounted because he also suffers from a psychiatric condition.

3. Substantial disability has been defined in California Code of Regulations, title 17, section 54001, subdivision (a) as: "(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and (2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age: (A) Receptive and expressive language; (B) Learning; (C) Self-care; (D) Mobility; (E) Self-direction; (F) Capacity for independent living; (G) Economic self-sufficiency."

Claimant's mental retardation constitutes a substantial disability for him. Claimant has significant language and learning deficits, as set forth in factual finding numbers 4, 8, 10, 11, and 12. He lacks self-direction, as set forth in factual finding number 11. Claimant's capacity for independent living and his ability for economic self-sufficiency are compromised by his cognitive deficits, his tendency to wander off, his need for supervision to use public transportation, and his inability to manage his money, as set forth in factual finding numbers 4, 8, 10, 11, and 12. These deficits are significant and pervasive, requiring interdisciplinary planning and coordination.

Claimant's psychiatric condition may also impact his functional limitations, particularly during an acute phase. However, his deficits were present before the psychiatric diagnosis and persist despite medication control of the mental illness.

4. By reason of the foregoing, Claimant has mental retardation, a developmental disability as defined in the Lanterman Act.²

² In light of this conclusion, it is unnecessary to determine whether Claimant is eligible under the "fifth category."

ORDER

Claimant's appeal is granted and Claimant is found eligible for services under the Lanterman Act.

DATED: _____

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.